APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007
Docket No. 07-0418-cv

[Decided: July 24, 2008]
Errata October 6, 2008

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE, THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES

ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,
Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE

M. BECKER, XEROX CORPORATION)
PLAN ADMINISTRATOR, XEROX)
CORPORATION RETIREMENT INCOME)
GUARANTEE PLAN, AND XEROX)
CORPORATION, A NEW YORK CORPORATION,)
Defendants-Appellants,)
)
XEROX CORPORATION,)
Defendant.)
)

[Argued: June 19, 2008]

Before : STRAUB and RAGGI, *Circuit Judges*, and SESSIONS, *District Judge*.*

Appeal from a January 24, 2007 order of the United States District Court for the Western District of New York (David G. Larimer, *Judge*) complying with our January 6, 2006 decision to remand the case to the District Court in order to craft a remedy to calculate Plaintiffs-Appellees' pension benefits in light of the violations we identified of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. We conclude that the District Court crafted a remedy consistent with our decision, applicable law, and the terms of the pension plan at issue. However, we also conclude that the District Court erred in refusing to enforce the release forms signed by several Plaintiffs-Appellees in this litigation.

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* The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ROBERT H. JAFFE (Mark B. Watson, Robert H. Jaffe & Associates, Springfield, New Jersey; George A. Schell, Schell & Schell, Fairport, New York; John A. Strain, Rodondo Beach, California, *on the brief*), Robert H. Jaffe & Associates, Springfield, New Jersey, *for Plaintiffs-Appellees*.

BRENDAN S. MAHER, Stris & Maher LLP, Dallas, Texas, *for Plaintiffs-Appellees*.

MARGARET A. CLEMENS, Nixon Peabody LLP, Rochester, New York, *for Defendants-Appellants*.

Maria Ghazal, Business Roundtable, Washington, D.C.; Jeffrey A. Lamken, Rachel M. McKenzie, Baker Botts LLP, Washington, D.C.; Allyson N. Ho, Baker Botts LLP, Dallas, Texas, *for Amicus Curiae Business Roundtable*.

STRAUB, Circuit Judge:

Plaintiffs-Appellees asserted claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against their current or former employer, Xerox Corporation ("Xerox"),[1] the pension plan administered for the benefit of its employees, and various individuals

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[1] Early in this litigation, the District Court dismissed Xerox as a party, and Plaintiffs-Appellees did not challenge this dismissal in their appeal. *See Frommert v. Conkright*, 433 F.3d 254, 256 n.2 (2d Cir. 2006).

associated with the administration of that plan. On remand from our first decision in this litigation, *see Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006), the District Court crafted a remedy to address the ERISA violations we had identified and concluded that the release forms signed by several Plaintiffs-Appellees did not bar their ERISA claims, *see Frommert v. Conkright*, 472 F. Supp. 2d 452, 456–59 (W.D.N.Y. 2007). Defendants-Appellants challenge both aspects of the District Court's decision. For the reasons set forth below, we reject Defendants-Appellants' first challenge and agree with the second. Accordingly, we vacate a portion of the District Court's order and remand the case to the District Court for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

We presume familiarity with the facts and procedural history of this case as set forth in our prior decision, *see Frommert*, 433 F.3d at 257–62, and we repeat them here only as relevant to the issues presented in this appeal. In that decision, we concluded that Defendants-Appellants had impermissibly amended the ERISA plan at issue through their method of determining retirement benefits for those beneficiaries who had previously left the company only to be rehired later. *Id.* at 264–68. When these beneficiaries left Xerox, they all received lump-sum distributions of their then-accrued pension benefits. *Id.* at 257.

The pension benefits of those who were subsequently rehired by Xerox were governed by a set

of ambiguous provisions in the pension plan documents. The 1989 Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan") provided that, "[i]n the event any part or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, . . . and such member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution." 1989 RIGP § 9.6. The 1997 version of the Plan provided both that "[n]o credit shall be given [to a participating employee] for any period with respect to which a lump sum payment has been made . . ." and that "Credit for Years of Participation preceding [such a payout] will be reinstated" in the event that such an employee returns to Xerox." *Frommert*, 433 F.3d at 260. Thus, in determining these employees' benefits, the plan administrator was required to account, in a manner unspecified to employees, for both an employee's total years of service at Xerox and the fact that the final benefits must be "offset by" an amount "attributable" to a prior lump sum distribution.

The plan administrator resolved this difficulty by utilizing a so-called "phantom account" offset mechanism. The phrase "phantom account" refers to the calculation of the current value of the employee's prior, lump-sum distribution by adjusting that amount for "hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been left in [the employee's] account[]" instead of being distributed to the employee upon first leaving Xerox. *Id.* at 259 (quoting 1995 "Benefits Update"). In estimating the pension benefit to which that employee would be entitled upon his or her future retirement

(and thus second separation) from Xerox employment, the plan administrator would both account for the employee's total years of service and deduct an amount based on the prior, lump-sum distribution, as augmented by the "phantom account" offset method. *See id.* at 259–61.

In our first decision, we concluded that the "phantom account" offset mechanism constituted a "retroactive cut-back" of anticipated pension benefits in violation of 29 U.S.C. § 1054(g), and that Defendants-Appellants had impermissibly amended the ERISA Plan to include that mechanism in violation of 29 U.S.C. § 1054(h). *See id.* at 266–68. We remanded to the District Court to fashion a remedy for these violations. *See id.* at 268. Specifically, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. In addition, we recognized that the District Court could apply the "phantom account" offset mechanism to employees hired after the 1998 amendment to the Plan because those individuals were on notice as to the mechanism's existence. *Id.* at 268–69. *But see Miller*

v. Xerox Corp. Retirement Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006) (holding that Plan's "phantom account" methodology itself violates ERISA), *cert. denied*, 127 S. Ct. 1829 (2007).

Acknowledging our guidance to employ "equitable principles" and reviewing the language of the Plan materials, the District Court concluded that the appropriate remedy for employees hired before the 1998 amendment was to direct the plan administrator to pay each of these individuals "a lump sum in the amount of the difference between the amount of benefits that [an employee] has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'"[1] Frommert, 472 F. Supp. 2d at 458 (internal quotation marks omitted). The District Court also stated that "it would not be unreasonable for the administrator to subtract out the amount of the prior distribution" in order to prevent such employees from receiving windfalls. *Id.* (alterations and internal quotation marks omitted).

In addition, the District Court concluded that the release forms signed by several Plaintiffs-Appellees in exchange for their receiving severance pay from Xerox did not release Defendants-Appellants from the ERISA-based claims asserted in this litigation. *See id.* at 460–65. Other matters addressed by the District Court on remand are not relevant to this appeal, which timely followed.

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[1] The District Court presumed that the parties would be able to agree on which employees had full notice of the "phantom account offset" mechanism because they were rehired after the 1998 Summary Plan Description ("SPD") had been issued. *See Frommert v. Conkright*, 472 F. Supp. 2d 452, 459 (W.D.N.Y. 2007).

DISCUSSION

On appeal, Defendants-Appellants raise two challenges to the District Court's decision. First, Defendants-Appellants argue that the District Court fashioned an improper remedy for the ERISA violation associated with the implementation of the "phantom account offset" mechanism. Second, Defendants-Appellants argue that the District Court erroneously decided that the release forms signed by certain Plaintiffs-Appellees did not bar their ERISA-based claims. For the reasons that follow, we agree with Defendants-Appellants that the release forms at issue bar the signatories' ERISA claims, but we will not disturb the District Court's chosen remedy.

I. Remedy

On appeal, Defendants-Appellants challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the impermissible amendment of the ERISA plan at issue to calculate Plaintiffs-Appellees' pension benefits according to a "phantom account" offset method. As discussed above, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when

> determining the appropriate calculation and fashioning the appropriate remedy.

Frommert, 433 F.3d at 268. We review a district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion. *See Chao v. Merino*, 452 F.3d 174, 185 (2d Cir. 2006).

Here, the Plan accounts for a retiring employee's total years of working at Xerox, but it also provides that an employee's benefits must "be offset by the accrued benefit attributable to [a prior distribution]." RIGP § 9.6. Plaintiffs-Appellees all received earlier, lump-sum distributions of their pension benefits when they first left their employment at Xerox, and the basic question presented to the District Court was how to ensure that these individuals received their due benefits in light of the ambiguous non-duplication of benefits provision. *See Frommert*, 472 F. Supp. 2d at 457–58 (construing and applying § 9.6 of 1989 Plan). On remand, the District Court decided that the appropriate remedy was to order the plan administrator to recalculate the relevant Plaintiffs-Appellees' benefits to deduct only the nominal value of their prior, lump-sum distributions, *i.e.*, without a "phantom account" adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflationadjusted values of the prior distributions. *See id.* at 458–59.

Defendants-Appellants fail to establish that the District Court's approach violated either the Plan terms or any law. Although Defendants-Appellants contend that the District Court failed to utilize pre-1998 Plan terms, the District Court explicitly did

so but simply applied those terms to Plaintiffs-Appellees differently than Defendants-Appellants proposed. In advocating their proposed "new hire" approach instead of the remedy crafted by the District Court, Defendants-Appellants argue that § 1.44(f) of the 1989 Plan requires that a rehired employee who then retires is entitled only to a pension benefit that accounts for his or her years of service since being rehired; the prior years of service are relevant only for the purpose of "vesting." However, in advocating this "new hire" method, Defendants-Appellants ignore the terms of the 1989 Plan, which is silent as to prior lump-sum distributions pursuant to § 8.2. To the extent that the 1997 Plan applies to certain Plaintiffs-Appellees, Defendants-Appellants ignore the language of § 1.45(f). *See Frommert*, 433 F.3d at 258–60 (discussing such provisions in the various versions of the Plan). Defendants-Appellants have failed to demonstrate that the District Court exceeded its allowable discretion in crafting its chosen remedy instead of adopting DefendantsAppellants' proposed approach.[2]

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[2] Defendants-Appellants also argue that the District Court's remedy confers a "windfall" on Plaintiffs-Appellees in violation of equitable principles. *See, e.g., Prudential Ins. Co. v. S.S. American Lancer*, 870 F.2d 867, 871 (2d Cir. 1989) ("[E]quity, we believe, abhors a windfall."). However, in contrast to *Prudential Insurance*, we do not view the remedy crafted by the District Court to be "wholly unjust" here because Defendants-Appellants wrote the terms of the ERISA Plan in an ambiguous and occasionally self-contradictory fashion. *Cf. Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir. 2003) (per curiam) (noting that, in interpreting an ERISA plan, a court "construe[s] ambiguities against the drafter and in favor of the beneficiary").

Alternatively, Defendants-Appellants contend that the District Court erred by failing to adopt the remedy proposed by the plan administrator or, at least, by failing to remand to the administrator the task of fashioning a remedy. Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that Defendants-Appellants actually requested such relief from the District Court. As such, they have waived the issue for appeal. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (alterations and internal quotation marks omitted)).

Even if Defendants-Appellants had not waived the remand issue, we would review the District Court's decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion. *See Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 648 (2d Cir. 2002); *Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 508 (2d Cir. 1994). The District Court here did not exceed its allowable discretion in this regard. Although we did not prohibit the District Court from remanding the case to the plan administrator, the language in our prior opinion presumed that the District Court would craft the remedy itself. *See Frommert*, 466 F.3d at 268.

Moreover, Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator before the District Court, and did so, in their briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan

administrator's approach. Indeed, Defendants-Appellants identify nothing that might have been gained by the District Court's remanding the matter to the plan administrator. *See Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008) (stating that plaintiffs were not entitled to administrative remand where doing so would have been "futile"); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995) (stating that remand to a plan administrator is not required where such additional proceedings would be a "useless formality" (internal quotation marks omitted)). In addition, we suggested, as "guidance for the district court," that it "may wish to employ equitable principles." *See Frommert*, 466 F.3d at 268. Defendants-Appellants identify no equitable principles that a district court might be employing, immediately upon remand from a circuit court, in merely performing the ministerial function of then remanding a case to an ERISA plan administrator.

Defendants-Appellants rely on *Miller v. United Welfare Fund* to argue that remand is appropriate when "reasonable minds could differ as to the outcome of the case." However, we directed the district court in *Miller* to remand the case to the plan administrator to permit the plan administrator to gather additional evidence relevant to the nursing care sought by the claimant. *See id.* Here, we did not anticipate any comparable, extensive fact finding, and none occurred on remand before the District Court. Indeed, the only "evidence" considered by the District Court consisted of expert testimony regarding which of various proposed remedies was the most fair and equitable. Given the apparent lack of any benefit to remanding the case to the plan administrator and the language in

our prior decision implying that the District Court should fashion its own remedy, *see id.* at 268–69, we cannot conclude that the District Court exceeded its allowable discretion in actually doing so.

In the alternative, Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. We have held that where the ERISA plan confers upon the plan administrator discretionary authority to "construe the terms of the plan," the district court should review a decision by the plan administrator under an excess of allowable discretion standard. *See Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (2d Cir. 2005) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). However, the District Court here had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations, all of which were premised on the now-impermissible "phantom account" offset mechanism. *See id.* ("[W]e may give deferential review only to actual exercises of discretion."). Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

To the extent that Defendants-Appellants argue that the District Court erred by instructing the plan administrator to calculate benefits by deducting the nominal value of prior distributions denominated in 1980s dollars from accrued benefits denominated in

current dollars, *see Appellants' Br.* at 38–41, we reject their argument for reasons similar to those applicable to their arguments on behalf of their own preferred "new hire" remedy. The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives. *Cf. Lifson v. INA Life Ins. Co. of N.Y.*, 333 F.3d 349, 353 (2d Cir. 2003) (per curiam) (instructing that a court should construe ambiguities in plan terms against the drafter of the ERISA plan).

II. Releases of Certain Plaintiffs' ERISA Claims

The final issue raised in this appeal is Defendants-Appellants' argument that the District Court erred in ruling that the release forms signed by several Plaintiffs-Appellees did not apply to the ERISA claims asserted in this litigation.[3] The releases at

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[3] The District Court stated that twenty-two of the named Plaintiffs signed release forms, but that four of these amended their forms to carve out explicitly their claims as members of the "Frommert lawsuit" from the universe of claims to be covered by the release. *See Frommert*, 472 F. Supp. 2d at 460. On appeal, Defendants-Appellants do not challenge the District Court's conclusion that these individuals' release forms did not cover their ERISA claims in this action. As a result, we will not disturb the

issue provided that the signing employee "release[s] Xerox from any and all claims . . . based on anything that has occurred prior to the date [he or she] sign[s] this Release" in exchange for up to fifty-two weeks of salary continuance. In addition, the form specifies several potential federal claims, including those based in ERISA, that the release covers.

As a threshold matter, Plaintiffs-Appellees argue, for the first time in this appeal, that Defendants-Appellants may not rely upon the release forms signed by several PlaintiffsAppellees because Federal Rule of Civil Procedure 17(a) requires that an action in federal court "be prosecuted in the name of the real party in interest." Although Defendants-Appellants are the pension plan at issue in this litigation and its administrators, Plaintiffs-Appellees argue that only Xerox Corporation has a "sufficient stake in reversing the trial court's ruling that the Xerox general release form constitutes a waiver of ERISA claims by the releasee." *Appellees' Br.* at 39. As noted above, the District Court dismissed Xerox early in this litigation, and PlaintiffsAppellees did not appeal this ruling. *See Frommert*, 433 F.3d at 256 n.2. Moreover, Plaintiffs-Appellees did not challenge the authority of Defendants-Appellants to rely upon the releases below and thus have waived this argument for purposes of this appeal. *See Rogers v. Samedan Oil Corp.*, 308 F.3d 477, 482–84 (5th Cir. 2002) (affirming district court's ruling that third-party defendant had waived real-party-in-interest defense by failing to assert it

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District Court's conclusion that the release forms do not bar the ERISA claims asserted by these four Plaintiffs-Appellees in this litigation.

until the day before trial); *Richardson v. Edwards*, 127 F.3d 97, 99 (D.C. Cir. 1997) (deeming real-party-in-interest defense waived when not raised until appellate proceedings).

Even if Plaintiffs-Appellees had not waived this argument, their real-party-in-interest argument is meritless because the release form itself defines its reference to "Xerox" to include "'the Xerox employee benefit plans'" in which the employee had participated or was then participating. *See Frommert*, 472 F. Supp. 2d at 460 n.2 (quoting release forms). Moreover, Defendants-Appellants are not the parties *prosecuting* this action; that role belongs to Plaintiffs Appellees. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1542 (2d ed. 1990) ("[T]he real party in interest principle . . . directs attention to whether [the] plaintiff has a significant interest in the particular action he has instituted, and Rule 17(a) is limited to plaintiffs."). *Cf. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 49 (2d Cir. 2005) (holding that a Rule 17(a) defect may not be cured by the joinder, as nominal defendants, of the real parties in interest to the action where those parties have evinced no intention of prosecuting the action). Thus, Plaintiffs-Appellees' real-party-in-interest argument fails.

As to the merits of Defendants-Appellants' arguments regarding the releases, "an individual can waive his or her right to participate in a pension plan governed by ERISA only if 'his or her waiver 'is made knowingly and voluntarily.'" *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992) (quoting *Laniok v. Advisory*

Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1365 (2d Cir. 1991)). We have articulated several factors as relevant to the determination of whether such a waiver is knowing and voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.
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> . . . [T]his list of factors [is] not exhaustive . . . .

Id. (internal citation omitted). A court should consider the "totality of the circumstances" in determining whether a waiver of ERISA rights is knowing and voluntary. *Id.*

Despite acknowledging the explicit and broad language in the release form, the District Court concluded that the instant ERISA claims were not covered due to perceived deficiencies related to "the clarity of the release and the consideration given by Xerox in exchange for the releases." *Frommert*, 472 F. Supp. 2d at 461–62. Specifically, the District Court focused on one paragraph in which the signing

employee agrees that "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." The District Court concluded that this language meant that the employee was not waiving his or her ERISA claim:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was not waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.
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> . . .
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> Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distinction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. In other words, those employees were "entitled by law" not simply to receive some pension benefits, but to have their benefits calculated

> without any reduction attributable to a "phantom" account.

Id. at 462 (footnote omitted; emphasis in original).

In reaching this conclusion, the District Court appears to have conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released.[4] The paragraph on which the District Court focused provided only that the consideration for the release, *i.e.*, the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled. However, there is no allegation that Defendants-Appellants violated this term of the contract by denying these Plaintiffs Appellees any and all pension benefits to which they

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[4] The District Court also appears to have concluded that the releases failed to comply with a provision of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), and that such noncompliance has relevance to the determination of whether these Plaintiffs-Appellees released Xerox from ERISA-based claims. *See Frommert*, 472 F. Supp. 2d at 463 n.5. Section 626(f) specifies several facts that must exist in order to render waiver of claims asserted under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, both "knowing and voluntary." We need not and do not decide whether the release forms complied with the requirements of the OWBPA because such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was "knowing and voluntary." *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002) ("[T]he OWBPA . . . applies only to ADEA claims."); *see also Tung v. Texaco Inc.*, 150 F.3d 206, 208-09 (2d Cir. 1998) (per curiam) (concluding that plaintiff's waiver of his Title VII claims was knowing and voluntary despite the employer's noncompliance with § 636(f) requirements applicable to his ADEA claims).

would have been entitled. To the contrary, counsel for Defendants-Appellants represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, albeit calculated under the "phantom account" offset method.

At bottom, neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs-Appellees likely expected at that time can render these releases unenforceable. As the method used to calculate pension benefits for rehired employees was, and has continued to be, disputed throughout this litigation, the precise amount of benefits that an employee signing a release would have received in the absence of such a release was always indeterminate. Plaintiffs-Appellees who signed these releases did so before the District Court crafted its remedy for the ERISA violations we identified. The mere fact that the anticipated recovery associated with ongoing litigation is uncertain does not render an employee's release of claims asserted in that litigation unenforceable. *Cf. Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund*, 902 F.2d 185, 189 (2d Cir. 1990) ("[A] settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.").

Applying the factors we have articulated as relevant to the issue of whether a waiver of ERISA rights was knowing and voluntary and reviewing the undisputed facts pertaining to these releases under the totality of the circumstances, *see Finz*, 957 F.2d at 82, we conclude that the District Court erred in holding that the releases at issue were unenforceable.

There appears to be no dispute that those Plaintiffs-Appellees who signed these releases had ample time (45 days) to decide whether to sign the release, that Xerox encouraged such individuals to consult an attorney, and that the signatories received salary continuances in consideration of their releasing claims. Some Plaintiffs-Appellees even modified the terms of the release forms with which they had been presented before signing them. As to the language of the releases themselves, we cannot conclude, as the District Court did, that the express terms of these releases were "at the very least ambiguous as to what the employee was giving up in exchange for salary continuance." *Frommert*, 472 F. Supp. 2d at 462. As the District Court's interpretation of the release forms is incorrect, it cannot stand. Unless the release form at issue specifically exempted this litigation as noted above, the releases signed by certain Plaintiffs-Appellees are enforceable.

CONCLUSION

For the foregoing reasons, we VACATE that portion of the order of the District Court holding that eighteen release forms are unenforceable, AFFIRM that portion of the order crafting a remedy for the identified ERISA violations, and REMAND the case for proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

00-CV-6311L

[Dated: January 24, 2007]

PAUL J. FROMMERT, et al.,
Plaintiffs,

v.

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Defendants.

DECISION AND ORDER

INTRODUCTION

This decision constitutes the latest chapter in a long-running dispute between employees of Xerox Corporation and administrators of Xerox's retirement plan, the Xerox Corporation Retirement Income Guarantee Plan ("the Plan"), concerning calculation of

retirement benefits. The dispute involves a relatively small group of employees who previously left employment at Xerox, received a lump-sum distribution upon their initial departure, and then were rehired by Xerox years later. Those employees are now contemplating retirement, or have retired, and the issue in dispute is how their present retirement benefits should be calculated.

With respect to this group of rehired employees, the Plan is designed so that an employee's total years of employment at Xerox, regardless of whether there was a break in service, are counted in calculating the employee's retirement benefits. Generally, the relevant pension calculations are based on the employee's total years of employment times a percentage of the employee's five highest-paying calendar years with Xerox. Both sides in this litigation agree that to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment. Just how that offset against current benefits should be calculated, though, has been a matter of much dispute and has engendered a great deal of litigation.

Familiarity with this Court's several prior decisions involving these parties, *see* 328 F.Supp.2d 420 (W.D.N.Y. 2004); 206 F.Supp.2d 435 (W.D.N.Y. 2002), and also the Second Circuit's decision of January 6, 2006, 433 F.3d 254 ("Second Circuit decision") is presumed. These decisions set out in great detail the relevant facts and disputed issues between the parties. There is, therefore, no need to restate those matters here.

The Second Circuit decision, which was on an appeal from two of this Court's prior decisions dismissing some of plaintiff's claims and granting summary judgment in favor of defendants on the remaining claims, resolved many of the issues raised between the parties. The Second Circuit affirmed in part, reversed in part, and remanded the case to this Court for further proceedings.

The Second Circuit held that the Plan's use of a so-called phantom account in determining present benefits violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.*, in several respects. First, the Plan's formula constituted a "retroactive cut-back" of benefits, 433 F.3d at 268, contrary to § 204(g) of ERISA. In addition, the court found that employees were not given proper notice in the Summary Plan Description ("SPD") of the nature and scope of the phantom account, at least prior to 1998, when the SPD was amended to include the phantom account and describe the offset procedure. *Id.* at 263, 269.

The Second Circuit determined that employees rehired after 1998 had sufficient notice as to the manner by which Xerox intended to treat their previous distribution. For those rehired prior 1998, though, the Second Circuit remanded to this Court and directed me to "utilize an appropriate pre-amendment [1998] calculation," *id.* at 268, without using the "phantom account," to determine current benefits.

Specifically, the Second Circuit directed as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998

> should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the Court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation in fashioning the appropriate remedy.

Id.

Subsequent to the Second Circuit's decision, the Court met with counsel to determine how best to proceed. The parties agreed to work together to see if they could resolve the issues remaining on remand. Although the parties appear to have spent some time attempting to reach a settlement, it is now apparent that they are unable, or unwilling, to settle.

The Court conducted a two-day hearing on the remedial issues raised by the Second Circuit and has received both pre-hearing and post-hearing memoranda from both sides. The parties have also discussed several cases from other jurisdictions dealing with similar issues. Having considered both sides' submissions and arguments, the Court now issues this Decision and Order concerning the issues before it on remand.

DISCUSSION

I. The Appropriate Calculation of Plaintiffs' Benefits

This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not give proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation*, 238 F.3d 205 (2d Cir. 2001). Other courts have reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003). It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

The Second Circuit also rejected Xerox's contention that a procedure utilizing a phantom account has always been a part of the Plan, even prior to 1998. 433 F.3d at 256. The Circuit determined that Xerox's use of the phantom account constituted a retroactive diminution of benefits, contrary to the law. *Id.* at 268. Furthermore, the Court of Appeals rejected Xerox's

contention that it had properly amended the Plan and notified the Plan's participants concerning utilization of the phantom account, prior to 1998. *Id.* at 263.

Although the Circuit clearly precluded use of the phantom account in determining how to treat prior distributions, it did little to elucidate what formula *should* be adopted, except to suggest using an "appropriate pre-amendment calculation" guided by equitable principles in determining the appropriate remedy for affected employees. *Id.* at 268.

The problem is that if one removes the phantom account mechanism, there is little else remaining. The Circuit expressly recognized this by noting the "difficulty" confronting the district court "because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." *Id.* at 268.

Describing the procedures to be utilized prior to the 1998 amendments as "ambiguous" is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire.

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the "phantom account," he also had no notice of some of

the other mechanisms suggested by witnesses at the remand hearing before me. What is "best" from a financial or actuarial point of view is not what the Court has been charged with determining. The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees.

To the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer. *See Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003) ("The consequences of an inaccurate SPD must be placed on the employer"). It was defendants' obligation to provide a clear description, in the SPD and in the Plan itself, as to how those prior distributions would be treated. To the extent that the Plan was constituted, at Xerox's doing, to consider all prior years of service, defendants had the burden of elucidating precisely how that would be accomplished.

As noted by the Court of Appeals in this case, 433 F.3d at 258, the Plan does have a provision, § 9.6, dealing with "nonduplication of benefits." That section provides as follows:

> *Nonduplication of Benefits.* In the event any part of or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member

> based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

"Accrued benefit," as used in § 9.6, is defined at § 1.1 as follows:

> The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section ... 4.3 [which sets forth the general method for calculating the normal retirement benefit], based, however, only upon Average Monthly Compensation received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed ... .

As the Court of Appeals noted, there was no description whatsoever as to the mechanics of this so-called phantom account. 433 F.3d at 258. For that reason, the Second Circuit and other courts rejected the administrator's utilization of such a mechanism in calculating benefits.

The SPD provides even less guidance than the Plan in this regard. As the Court of Appeals noted, the only notice in the SPD concerning non-duplication of benefits was the proviso that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id.* at 265 (citing *Layaou*, 238 F.3d at 210). The Court of Appeals in both *Frommert* and *Layaou* determined that this bare-bones notice failed to adequately apprise employees as to the phantom account mechanism.

In addition, as those and other cases make clear, where the Plan and the SPD conflict, the SPD controls. *See Burke,* 336 F.3d at 110; *Frommert,* 433 F.3d at 265. *Accord Tocker v. Philip Morris Companies, Inc.*, 470 F.3d 481, 487-88 (2d Cir. 2006); *Demirovic v. Building Service 32 B-J Pension Fund*, 467 F.3d 208, 210 n. 1 (2d Cir. 2006); *Bouboulis v. Transport Workers Union of America*, 442 F.3d 55, 61 (2d Cir. 2006).

The question, then, is what, in light of these vague provisions in the Plan and SPD, this Court should to do to remedy the violation of ERISA. I believe that the best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation,* 330 F.Supp.2d 297 (W.D.N.Y. 2004). In *Layaou*, I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'" *Id.* at 305 (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual calculation of the plaintiff's benefits in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id.* at 304.

The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have

anticipated based on the not-very-clear language in the Plan and SPD. Again, if there is some doubt or ambiguity as to this formula, it must be resolved in favor of the employee. *See Lifson v. INA Life Ins. Co. of New York*, 333 F.3d 349, 353 (2d Cir. 2003) (in reading an ERISA plan, "[w]e construe ambiguities against the drafter and in favor of the beneficiary"); *Perreca v. Gluck*, 295 F.3d 215, 223 (2d Cir. 2002) ("absent evidence indicating the intention of the parties, any ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").

In so ruling, I also reject defendants' suggestion that the phantom account offset can properly be applied to *all* employees' accrued benefits earned *after* 1998, regardless of when the employees were rehired. As defendants themselves note, the Second Circuit's statement that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," 433 F.3d at 263, "does not expressly contain this limitation," Defendant's Pre-Hearing Brief Addressed to Remedies, Dkt. #121-1 at 23, and I decline defendants' invitation to infer such a limitation from that apparently categorical statement. The Court of Appeals gave this Court specific directives on remand, and determining whether the phantom account offset should apply to post-1998 earned benefits of employees rehired prior to that date was not among those directives.

II. Which of the Plaintiffs Were Rehired by Xerox after the Plan Was Amended in 1998

The Court of Appeals also directed the district court "to determine which of the plaintiffs were rehired by

Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms." 433 F.3d at 269. This directive relates to the Second Circuit's holding that "for employees rehired subsequent to the amendment of the Plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them." *Id.* at 263. As the court explained,

> [e]mployees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who lacked such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.

Id. at 269. That matter does not appear to be in dispute, however, and I presume that the parties will be able to agree on whether each employee was rehired prior to or after the 1998 amendment date. If the parties are unable to agree about whether a particular employee was rehired prior to that, they may seek a determination of that question from the Court.

III. Effect of the Releases Signed by Twenty-Two Plaintiffs

On January 5, 2001, plaintiffs' counsel filed a motion for "emergent injunctive relief," seeking relief in connection with Xerox's offer to plaintiffs to accept the termination of their employment as part of a

reduction in force ("RIF"), and to sign a general release waiving any existing or potential claims they might have had against Xerox–including ERISA claims–in exchange for salary continuance, a form of severance benefit in which the employee would continue to receive his full, regular salary for a specified period even after he stopped working at Xerox.

In his affidavit in support of that motion, plaintiffs' attorney, Robert H. Jaffe, Esq., characterized Xerox's offer as a form of discrimination against his clients based on their exercise of their rights under ERISA by filing or joining this lawsuit challenging defendants' use of the phantom account offset. Dkt. #47 ¶ 2.

In his affidavit, Jaffe noted that the proposed release "includes a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." *Id.* ¶ 5. He added that "[t]he form of general release which Xerox has asked at least five clients of my law office to execute explicitly includes a release of all claims under ERISA." *Id.* ¶ 8.

Jaffe stated that as of the date of the affidavit, five of his clients, three of whom were then named plaintiffs in this action, had asked him to review the proposed release "and suggest an alternative which would avoid a waiver of their rights under ERISA," at least until the Second Circuit issued a decision in *Layaou*, which was then pending before the Court of

Appeals.[1] *Id.* ¶ 9. Jaffe stated that he had drafted a revised release containing language "which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." *Id.* ¶ 10. Jaffe said that his clients had presented the revised release to Xerox, but were told by Xerox that "it was unacceptable." *Id.*

After hearing oral argument, this Court denied plaintiffs' motion in open court on January 11, stating in effect that I saw no ERISA violation in an employer's conditioning an offer of severance benefits on a release of ERISA claims. *See* Dkt. #53 at 38-42.

Twenty-two of the 104 named plaintiffs did subsequently sign the releases and were terminated in a RIF in exchange for salary continuance. Dkt. #133-7. Although the exact language used varies somewhat among the releases, in general they state that the employee "release[s] Xerox from any and all claims, even if [the employee] d[oes]n't know about the claim at this time, based on anything that has occurred prior to the date [the employee] sign[s] this Release."[2] The releases expressly referenced a number of types of claims covered by the release, including ERISA claims. With certain exceptions not relevant here, the releases also provided that the employee agreed not to "file or

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[1] The Second Circuit's decision remanding *Layaou* was issued about two weeks after plaintiffs filed their motion, on January 18, 2001.

[2] "Xerox" is defined by the releases to include, *inter alia*, "the Xerox employee benefit plans" in which the employee was a participant, as well as the trustees and administrators of those plans. Dkt. #133-7.

pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before [the employee] signed this Release." *Id.*

Each release also states that the employee "acknowledge[s] and agree[s] that the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." *Id.* Four of the releases, however, contain additional language carving out an exception for plaintiffs' claims in this action: "I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit." *Id.* at 49, 57, 69, 88.

Plaintiffs now contend that the execution of these releases, even the ones without a specific exclusion for the claims in this lawsuit, does not bar any of them from pursuing their ERISA claims in this action. Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.

As a preliminary matter, I note that plan participants can waive ERISA claims, and that such waivers will be enforced as long as they are knowing and voluntary. *See, e.g., Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1367 (2d Cir. 1991) ("the age discrimination provision of ERISA does not prohibit an individual waiver of pension plan participation by an older employee, ... so long as the waiver is knowing and voluntary"); *Mange*

v. Petrolite Corp., 960 F.Supp. 206, 209 (E.D.Mo. 1997) ("Under ERISA, a release of claims by plan participants is valid so long as it is knowing and voluntary"). There is also authority that "[a] settlement agreement that releases legal claims in exchange for severance benefits may be enforced under ERISA." *Seman v. FMC Corp. Ret. Plan*, 334 F.3d 728, 731-32 (8th Cir. 2003); *see also Smart v. Gillette Co. Long-Term Disability Plan*, 887 F.Supp. 383, 386 (D.Mass. 1995) (employee knowingly, intentionally, and voluntarily agreed to a severance plan that included a general release which precluded her ERISA claim), *aff'd*, 70 F.3d 173, (1 Cir. 1995).

The Second Circuit has cautioned, however, that "[t]he validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims." *Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir. 1992), *cert. denied*, 506 U.S. 822 (1992); *accord Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 231 (2d Cir. 1995). Courts should look to the "totality of circumstances" to determine whether a release is knowing and voluntary. *Sharkey v. Ultramar Energy Ltd., Lasmo plc, Lasmo (AUL Ltd.)*, 70 F.3d 226, 231 (2d Cir. 1995).

The relevant factors to consider in this analysis include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7)

whether the employer encouraged the employee to consult an attorney; and (8) whether the employee had a fair opportunity to do so. *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 402-03 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989). These factors are not exhaustive, and all need not be satisfied before a release is deemed enforceable. *Id.*

Here, some of these factors, such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases. Other factors, however, are more troubling, particularly the clarity of the release and the consideration given by Xerox in exchange for the releases.

Paragraphs 3 and 4 of the releases generally provide that the employee releases Xerox from any and all employment-related claims.[3] Paragraph 3 states that the employee "release[s] Xerox from "any and all claims ... based on anything that has occurred prior to the date" on which the employee signed the release, and paragraph 4 states that the employee "also release[s] Xerox from claims based on [any federal, state or local law] concerning employment ... ." Paragraph 3 lists ERISA claims as one of the types of claims waived by the employee. Read literally, this could be construed to mean that the employee was waiving *any* claim under ERISA, based on anything

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[3] These numbers refer to Xerox's standard release form for participation in a voluntary RIF. *See, e.g.*, Dkt. #133-7 at 47. The numbering varies somewhat among the releases signed by plaintiffs (some of whom were terminated in involuntary RIFs), though the provisions are essentially the same.

that occurred prior to the date on which he signed the release.

As stated, paragraph 5 states that the consideration set forth in the release, *i.e.*, Xerox's agreement to provide the employee with salary continuance, is "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." This provision was presumably included in the release in order to conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which was enacted by Congress to modify the Age Discrimination in Employment Act ("ADEA") in certain respects, *see Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 150 (2d Cir. 2006).

The OWBPA provides in part that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and that in general "a waiver may not be considered knowing and voluntary unless at a minimum" certain conditions are met, one of which is that "the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled ... ." 29 U.S.C. § 626(f).

The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was *not* waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.

Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i.e.*, ERISA, or under Xerox's own policies, they did not waive their rights to such benefits. Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distiction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA.[4] 433 F.3d at 268. In other words, those employees were "entitled by law" not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Even if some other interpretations of the releases might be plausible, the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance. Section 5 may have been added primarily to comply with the OWBPA, but it cannot be ignored, and when read in conjunction with paragraphs 3 and 4, it appears to create some doubt about whether the release truly covered all ERISA claims, especially the proper calculation of benefits to which the employee was entitled.[5]

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[4] ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1).

[5] I recognize that there is authority that noncompliance with the OWBPA does not automatically invalidate a release as to non-

I recognize that these releases were signed during this litigation, and that in plaintiffs' January 5, 2001 motion for injunctive relief, plaintiffs' own counsel expressed his concern that the releases would constitute "a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." Certainly these facts could suggest that at least some of the parties understood the releases to cover their claims in this lawsuit. That does not alter the fact, though, that by its terms, the release appears to except from the scope of the waiver any benefits to which the employee is legally entitled. Under Xerox's interpretation, the Plan administrator could refuse to pay an employee *any* pension and, by dint of the release, the employee could do nothing about it. Again, any ambiguity on that score should be resolved against Xerox, which drafted the releases. *Lifson*, 333 F.3d at 353; *see also Albany Savings Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997) ("ambiguities in contracts should be construed against the drafter").

Furthermore, if it had been the parties' mutual understanding that the releases covered all of

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ADEA claims. *See Chaplin v. Nationscredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002); *Kaminski v. CoreStates Fin. Corp.*, No. CIV. A. 98-CV-1623, 1998 WL 800536, at *3 (E.D.Pa. Nov. 18, 1998) That does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." 29 U.S.C. § 626(f)(1). Thus, an employer's tendering of consideration that does not exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

plaintiffs' claims in this litigation, it would have been a simple enough matter for Xerox to have included language to that effect in the releases. *See, e.g., Morais v. Central Bev. Corp. Union Employees' Supplemental Ret. Plan*, 167 F.3d 709, 711 (1st Cir. 1999) (enforcing settlement agreement and release that expressly stated that plaintiff had directed his union to withdraw his grievance and demand for arbitration over disputed benefits). A single sentence would have clarified the matter. That some of the *plaintiffs* added language to their releases making clear that the releases did not cover their claims in this action demonstrates how easy it would have been for Xerox to insert language in the other releases to include the employees' claims in this particular case, which was already in litigation.[6]

The omission of any mention of this lawsuit is, in one sense, not surprising, though it is still worth noting. On their face, these releases (other than the ones to which some plaintiffs inserted language expressly excepting their claims in this case from the scope of the release) do not appear to have anything to do with this litigation. Rather, they appear to be standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of the employee's later assertion of claims relating to his termination in the

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[6] One could argue, of course, that the language added by several plaintiffs excluding their claims in *Frommert* suggests that the other releases *did* cover those claims. That some plaintiffs chose to insert language clarifying what they understood to be the scope of the release, however, sheds little light on the meaning of the other plaintiffs' releases, which remain, at best, ambiguous on that score.

RIF. In an effort to make them comprehensive, the release form lists an array of statutes, including ERISA, that it is intended to cover, but otherwise there is no suggestion that plaintiffs' claims in this case, or any other particular claims, were being waived. On the contrary, the reference to the stated consideration being "in addition to anything of value to which [the employee is] entitled by law or Xerox policy" suggests that the employee did *not* waive any then-pending claims alleging an entitlement to some particular benefits.

Another factor that the Second Circuit has directed courts to consider in deciding whether a waiver is enforceable is whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law. *Bormann*, 875 F.2d at 403. In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.*, salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset. In the case of plaintiff Pietrowski, for example, it appears that his prior lump-sum payment at the time of his first separation, plus his severance pay at the time of his second separation, totaled about $210,000, but that he would have received over $832,000 as a lump-sum payment of his standard Plan annuity. *See* Dkt. #130-2 Ex. D.

Defendants do not appear to dispute that the plaintiffs in question received less than they would have without the phantom account offset; they simply contend that the consideration received was substantial, and that in any event, the disparity is not as great as plaintiffs contend because defendants'

proposed remedial approach would still result in a lesser benefit than what plaintiffs seek. Of course, I have rejected that remedial approach.

The consideration received by plaintiffs here–in some cases up to a year's salary–was not insignificant. In light of the Second Circuit decision, however, it cannot be said that these benefits exceeded what plaintiffs were entitled to by law, *i.e.*, pension benefits calculated without a phantom account offset. While it is true that plaintiffs did not know, at the time that they signed the releases, what the ultimate result of this litigation would be, both they and Xerox knew that plaintiffs were pursuing ERISA claims for amounts far greater than what Xerox was offering them in exchange for signing the releases.[7] This at least casts some additional doubt on whether the releases were entered into knowingly and voluntarily with respect to plaintiffs' ERISA claims. *See Unum Life Ins. Co. of America v. Cappello*, 278 F.Supp.2d 228, 236 (D.R.I. 2003) (value of consideration that plan participant received, though "not an insubstantial sum," did not match what issuer of plan contended she waived by entering into severance agreement, since it was likely that amount of benefits to which she would have been entitled would have been substantial).

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[7] It appears that one plaintiff, Matthew Alfieri, signed his release on October 27, 2006, after the Second Circuit decision was issued. Dkt. #133-7 at 46. I see no reason for this Court to rule any differently as to Alfieri, however. If anything, the Second Circuit decision had by that point made it even clearer that Alfieri, like the other plaintiffs, was entitled to calculation of his pension benefit without the phantom account offset, and therefore that he was not waiving his claim in that regard.

I also note that paragraph 3 only releases Xerox from claims "based on anything that ha[d] occurred prior to the date" on which the release was signed. Arguably, that language did not cover plaintiffs' later receipt of benefits, in amounts less than that to which they claim they are entitled, due to the use of the phantom account offset. At the time the releases were signed, plaintiffs had not yet left Xerox's employ, and had only received projections of what their benefits would be. Again, that is not the only reasonably interpretation; one could also argue that in light of the existence of this lawsuit challenging that very offset, everyone involved understood the releases to cover any claims concerning the offset. But this nonetheless adds to the ambiguity of the scope of the release, which should not be resolved against plaintiffs.

IV. Breach of Fiduciary Duty

In its decision in this case, the Court of Appeals concluded that there was a triable issue of fact as to "whether the defendants had fiduciary obligations under ERISA and if so whether they breached them ... ." 433 F.3d at 271. The court stated that

> [o]n remand, the district court should permit a trier of fact to assess (1) whether the defendants acted in a fiduciary capacity when they communicated with the Plan's beneficiaries about the implementation of the phantom account, and (2) whether those communications contained affirmative misrepresentations of fact concerning the Plan or breached the defendants' duty to deal fairly with the Plan's beneficiaries.

Id. at 271-72. The court also "direct[ed] the district court that if the plaintiffs prevail on this claim, it must determine what 'appropriate equitable relief' is necessary." *Id.* at 272.

Although it might appear difficult to reconcile this directive with the Court of Appeals' holding that "[b]ecause adequate relief is available under [§ 502(a)(1)(B), which allows a plan participant 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan'], there is no need on the facts of this case to also allow equitable relief under § 502(a)(3)," 433 F.3d at 270, I find it unnecessary to resolve any apparent contradiction in that regard, since plaintiffs do not appear to seek any equitable relief on remand, other than relief which either this Court has effectively granted, or which the Second Circuit has already found to be unwarranted.

Plaintiffs do contend that the Court should rule that the Second Circuit's decision in this case is "class-based," and that it "encompasses all rehired Xerox employee rehired prior to the publication of the September 1998 SPD," Dkt. #129-1, but to the extent that plaintiffs seek some sort of declaratory or injunctive relief in that regard, the Second Circuit has held that this is not a proper case for such relief. As stated, the Court of Appeals held that "the necessary remedies can be fully provided under § 502(a)(1)(B)," 433 F.3d at 269, and concluded that "sweeping relief" in the form of a judgment declaring that the phantom account is prohibited by ERISA and enjoining its

application in calculating the benefits of any Plan participants was "not warranted," *id.*[8]

Having said that, the rulings contained both in the Second Circuit decision and in this Decision and Order *do* seem applicable to all Xerox employees who are similarly situated to the named plaintiffs. Leaving aside any particularized defenses that the Plan might have against individual employees, I do not see how defendants could continue to utilize the phantom account as to such employees without running afoul of the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." 433 F.3d at 263. The clear import of the Second Circuit's decision is that utilization of the phantom account with respect to employees rehired before the 1998 Plan amendment violates ERISA. But neither this Court, nor apparently the Second Circuit, sees any basis for granting equitable relief in that regard at this time.

I also note that the purported basis for plaintiffs' claim for breach of fiduciary duty appears to have shifted somewhat over the course of this litigation. Originally, plaintiffs alleged that "defendants breached their fiduciary duty to Plan participants by publishing and supplying misleading information in SPDs, annual Personal Benefits Statements and in response to the plaintiffs' requests for clarification of their rights under the Plan." 433 F.3d at 270. On remand,

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[8] If plaintiffs' use of the term "class-based" is meant to imply that the Court should grant some "class"-wide relief, that request is also denied. This is not a class action, nor have plaintiffs ever presented it as, or sought to make it a class action.

however, this claim seems to focus largely if not entirely on the releases signed by some of the plaintiffs. Specifically, plaintiffs now contend that defendants breached their fiduciary obligation to disclose to those Plan participants who signed the release "that implementation of the phantom account offset violates ERISA § 204(g) and ERISA § 204(h) and further that the consideration paid for executing the release was substantially less than the retirement benefits to which they may be entitled to receive [sic] if the phantom account offset was not applied." Dkt. #129-1 at 15.

In any event, the relief that plaintiffs now seek is simply a ruling by this Court that the releases are unenforceable against plaintiffs insofar as it purports to waive claims for "enhanced" retirement benefits, *i.e.*, benefits calculated without using the phantom account offset. *See id.* at 19. That is essentially what the Court has done. Plaintiffs are getting all of the relief, equitable or otherwise, to which they are entitled. There is no need, therefore, to rule on plaintiffs' claim for breach of fidudiary duty.

V. Plaintiff Holland

Plaintiff Lawrence R. Holland has at all relevant times been an hourly (*i.e.*, non-salaried) Xerox employee who is covered by the terms of a collective bargaining agreement. Defendants contend that as such, Holland has never been a participant in the Plan, which by its terms excludes from its coverage "[a]ny person covered by a collective bargaining agreement, the terms of which do not require coverage under this Plan ... ." Dkt. #121-5 at 6. Therefore,

defendants contend, Holland lacks standing to sue for benefits under the Plan.

In response, plaintiffs do not appear to deny that Holland is a participant in a different pension plan from the one at issue in this case, but contend that the plan in which he is a participant utilizes the same phantom account offset as the Plan covering the other plaintiffs. The essence of plaintiffs' argument seems to be that the Court should simply allow Holland's claims to go forward in this case so that hourly Xerox workers will be able to benefit from the Second Circuit's rulings in this case and the relief ordered by this Court with respect to the other named plaintiffs.

Holland's request must be denied. It is axiomatic that only plan participants and beneficiaries may sue for benefits under § 1132(a)(1)(B). *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100-01 (2d Cir. 2005) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27 (1983)). Holland's suggestion that the Court allow the administrators of his plan to be joined as defendants in this action is denied, as plaintiff has shown no basis for adding additional defendants in this case at this late date. Plaintiffs' contention that defendants have only recently raised the argument that Holland is not entitled to any benefits under the Plan is contradicted by this Court's July 30, 2004 Decision and Order, in which I expressly referenced (but found it unnecessary to decide) defendants' arguments to that effect, 328 F.Supp.2d at 439 n. 14. Furthermore, plaintiffs have made no motion to amend the complaint to add additional defendants, and plaintiffs' memoranda and

other papers on remand are not a proper vehicle for making such a request.[9]

VI. Plaintiffs' Motion to Amend the Complaint

On November 6, 2006, plaintiffs filed a motion for leave to file a second amended and consolidated complaint, adding a number of additional plaintiffs in this case. The gist of the motion was that following the remand from the Second Circuit, additional Xerox employees who had been separated from and then rehired by Xerox prior to 1998 contacted plaintiffs' counsel, seeking to join in or obtain the benefits of this lawsuit. Plaintiffs' counsel wrote to the Plan administrator, essentially asking him to waive these individuals' exhaustion requirements under ERISA and apply the rulings of this Court and the Court of Appeals in this case and in *Layaou* to these additional Plan participants. Dkt. #132-3 at 1-4. The administrator's response was, essentially, that until a "final resolution" of this action, the phantom account offset would continue to be applied to all Plan participants, with "no exception or deviation." *Id.* at 5.

To the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit. As stated earlier, the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," 433 F.3d at 263,

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[9] It would seem to be beyond dispute, though, that use of a "phantom account" in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan. It is presumed that no plan administrator would knowingly violate ERISA.

would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.

At this point, however, this motion has not been briefed by defendants, and since there may be issues involving individualized defenses or other matters bearing upon the motion to amend, I will not decide the motion at this time, but will instead reserve decision after the matter has been fully briefed, as set forth in the Conclusion of this Decision and Order.

CONCLUSION

Plaintiffs' motion for a determination of the decision of the Second Circuit Court of Appeals and for other further relief (Dkt. #129) is granted in part and denied in part, and defendants' cross-motion for partial summary judgment (Dkt. #133) is granted in part and denied in part. Defendants are hereby directed to recalculate plaintiffs' retirement benefits, consistent with the terms of this Decision and Order and the January 6, 2006 decision of the Court of Appeals for the Second Circuit, and to pay each plaintiff a lump sum in the amount of the difference between the amount of benefits that each plaintiff has received, and the amount of the recalculated benefit, without any consideration of a "phantom account." Plaintiffs' claim for breach of fiduciary duty is denied as moot. Plaintiff Lawrence Holland's claims are dismissed in their entirety.

Defendants are directed to respond to plaintiffs' motion for an extension of time to file a second consolidated and amended complaint (Dkt. # 132) within thirty (30) days after the date of issuance of

this Decision and Order. Plaintiffs shall file reply papers no later than fifteen (15) days after the date that defendants' response is filed.

IT IS SO ORDERED.

/s/_____
DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
January 24, 2007.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-0418-cv

[Filed September 25, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight.

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE,

THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,

Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, AND XEROX CORPORATION, A NEW YORK CORPORATION, *Defendants-Appellants*,	)
XEROX CORPORATION, *Defendant*.	)

Appellees, Paul J. Frommert, Alan H. Clair, Donald S. Foote, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-0418-cv

[Filed September 25, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight.

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLACHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE,

THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,

Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, AND XEROX CORPORATION, A NEW YORK CORPORATION, *Defendants-Appellants*,	)
XEROX CORPORATION, *Defendant*.	)

Appellants, Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 07-0418-cv

[Filed September 25, 2008]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight.

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE,

THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H. UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, AND JANICE ROSS HEILER,

Plaintiffs-Appellees,

v.

SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, AND XEROX CORPORATION, A NEW YORK CORPORATION, *Defendants-Appellants*,	)
XEROX CORPORATION, *Defendant*.	)

Appellees, Kenneth W. Pietrowski, William Burritt, William Coons, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/_____
Richard Alcantara, Deputy Clerk

APPENDIX F

XEROX®

Name: Charles Hobbs
Employee# 188766
SSN: [REDACTED]-7427

PSG
VOLUNTARY REDUCTION IN FORCE

REQUEST TO PARTICIPATE & GENERAL RELEASE

Request to Participate

1. I hereby request to participate in the Voluntary Reduction in Force Program ("VRIF") as described in the 2005 BGO Production Systems Group Voluntary Reduction in Force Employee Fact Sheet, dated October 24, 2005 (the "Fact Sheet"). My decision to apply is voluntary and I have not been pressured into it. I have carefully reviewed and understand the Fact Sheet, and agree to all its terms and conditions. I have not relied on any oral representations, promises or agreements of any kind in connection with my decision to apply to participate in the VRIF.

General Release

2. In consideration of Xerox Corporation's ("Xerox") agreement to provide me with salary continuance (per the terms of the VRIF Employee Fact Sheet provided to me) and other

valuable consideration, I release Xerox from all the claims described in this Release. For purposes of this Release, "Xerox" includes its employees, directors, officers, agents, stockholders, subsidiaries, affiliates, successors, assigns, and the Xerox employee benefit plans in which I either am now or have been a participant, and the trustees, administrators, successors, agents and assigns of those plans.

3. I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release. For example, I release Xerox from any claims based on all laws, such as the following (all laws as currently amended):

Age Discrimination and Employment Act of 1967 (ADEA)
Older Workers's Benefits Protection Act of 1990 (OWBPA)
Title VII of the Civil Rights Act of 1964
Civil Rights Acts of 1866, 1870, 1871 and 1991
Americans with Disabilities Act of 1990
Rehabilitation Act of 1973
Family and Medical Leave Act of 1993
Equal Pay Act of 1963
Fair Labor Standards Act of 1938

Employee Requirement Income Security Act of 1974
Workers Adjustment and Retraining Notification Act of 1989
Uniformed Services Reemployment Rights Act of 1994
Vietnam Era Veteran's Readjustment Assistance Act of 1974

4. I also release Xerox from claims based on the laws of the state(s) where I am employed and reside, such as state fair employment practices laws or any other law, whether federal, state or local, concerning employment. I release Xerox from claims based on discrimination in employment such as claims arising out of the offer of employment to me by Xerox, the hiring of me by Xerox, any employment contract between Xerox and me, any promises made by Xerox regarding future employment, or based on the termination of my employment. Finally, I also release Xerox from claims under state contract or tort law, and from all claims for punitive or compensatory damages, costs or attorney's fees.

5. I acknowledge and agree that the consideration set forth in this release is in addition to anything of value to which I am entitled by law or Xerox policy.

6. I understand and agree that this Release and Xerox's agreement to provide consideration to

me should not be construed, in any way, as an admission by Xerox of any wrongdoing or liability to me.

/s/ CH
Please initial page 1 here

[Received DEC 7, 2005]

7. I understand that nothing set forth in this Release limits my right to file, or prevents me from filing, a charge or complaint with the EEOC or any comparable state agency, nor does anything in this Release limit my right to participate in an investigation or proceeding conducted by the EEOC or any comparable state agency.

8. I understand that nothing in this Release limits my right to challenge this Release as not being knowing and voluntary under the ADEA or the OWBPA if I feel this Release does not comply with the requirements of those statutes.

9. Except as provided in paragraphs 7 and 8 above, however, I agree that I will not file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before I signed this Release. If I do not comply with my obligations under this paragraph, I shall repay to Xerox upon demand all of the monies paid to me by Xerox as salary continuance in consideration for this Release, and I agree to pay all of Xerox's costs and expenses in

defending the claim or action, including Xerox's reasonable attorney's fees.

10. I understand and acknowledge that Xerox policy provides that for a period of one year after the termination of my employment with Xerox, I am not eligible for rehire as an employee, or for retention as a contract worker or consultant.

11. I acknowledge that I have been advised by Xerox as follows:

- **TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE I SIGN THIS RELEASE;**
- **TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE. I HAVE 45 DAYS FROM THE DATE THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN IT TO XEROX;**
- **THAT EVEN AFTER I SIGN AND RETURN THIS RELEASE TO XEROX, I WILL HAVE 7 DAYS THEREAFTER TO CHANGE MY MIND AND REVOKE MY RELEASE BY ASKING XEROX FOR ITS RETURN.**

12. I understand and agree that this Release waives all claims I may have at the time I sign it, including claims I do not then know about or suspect. I further understand and acknowledge that California Civil Code, Section 1542 provides: "A GENERAL RELEASE DOES NOT

EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." I waive any rights I may have under that Code section, if applicable, or any other similar state or federal statute or common law principle of similar effect.

Date Release provided to employee: October 24, 2005

Date signed and returned to Xerox: Dec. 7, 2005.

By: /s/ Charles Hobbs
Employee signature

Charles Hobbs
Employee Name (Please print)

188766
Xerox Employee Number

General Release
Revised August 23, 2005

APPENDIX G

XEROX®

Name: Charles Zabinski
Employee# 973201
SSN: [REDACTED]-1328

PS&SCO
VOLUNTARY REDUCTION IN FORCE

REQUEST TO PARTICIPATE & GENERAL RELEASE

Request to Participate

1. I hereby request to participate in the Voluntary Reduction in Force Program ("VRIF") as described in the 2005 BGO Paper, Supplies & Supply Chain Operations Voluntary Reduction in Force employee Fact Sheet, dated August, 2005 (the "Fact Sheet"). My decision to apply is voluntary and I have not been pressured into it. I have carefully reviewed and understand the Fact Sheet, and agree to all its terms and conditions. I have not relied on any oral representations, promises or agreements of any kind in connection with my decision to apply to participate in the VRIF.

General Release

2. In consideration of Xerox Corporation's ("Xerox") agreement to provide me with salary continuance (per the terms of the VRIF

Employee Fact Sheet provided to me) and other valuable consideration, I release Xerox from all the claims described in this Release. For purposes of this Release, "Xerox" includes its employees, directors, officers, agents, stockholders, subsidiaries, affiliates, successors, assigns, and the Xerox employee benefit plans in which I either am now or have been a participant, and the trustees, administrators, successors, agents and assigns of those plans.

3. I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release. For example, I release Xerox from any claims based on all laws, such as the following (all laws as currently amended):

Age Discrimination and Employment Act of 1967 (ADEA)
Older Workers's Benefits Protection Act of 1990 (OWBPA)
Title VII of the Civil Rights Act of 1964
Civil Rights Acts of 1866, 1870, 1871 and 1991
Americans with Disabilities Act of 1990
Rehabilitation Act of 1973
Family and Medical Leave Act of 1993
Equal Pay Act of 1963
Fair Labor Standards Act of 1938

Employee Requirement Income Security Act of 1974
Workers Adjustment and Retraining Notification Act of 1989
Uniformed Services Reemployment Rights Act of 1994
Vietnam Era Veteran's Readjustment Assistance Act of 1974

4. I also release Xerox from claims based on the laws of the state(s) where I am employed and reside, such as state fair employment practices laws or any other law, whether federal, state or local, concerning employment. I release Xerox from claims based on discrimination in employment such as claims arising out of the offer of employment to me by Xerox, the hiring of me by Xerox, any employment contract between Xerox and me, any promises made by Xerox regarding future employment, or based on the termination of my employment. Finally, I also release Xerox from claims under state contract or tort law, and from all claims for punitive or compensatory damages, costs or attorney's fees.

5. I acknowledge and agree that the consideration set forth in this release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit.

6. I understand and agree that this Release and Xerox's agreement to provide consideration to me should not be construed, in any way, as an admission by Xerox of any wrongdoing or liability to me.

/s/ CZ
Please initial page 1 here

7. I understand that nothing set forth in this Release limits my right to file, or prevents me from filing, a charge or complaint with the EEOC or any comparable state agency, nor does anything in this Release limit my right to participate in an investigation or proceeding conducted by the EEOC or any comparable state agency.

8. I understand that nothing in this Release limits my right to challenge this Release as not being knowing and voluntary under the ADEA or the OWBPA if I feel this Release does not comply with the requirements of those statutes.

9. Except as provided in paragraphs 7 and 8 above, however, I agree that I will not file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before I signed this Release. If I do not comply with my obligations under this paragraph, I shall repay to Xerox upon demand all of the monies paid to me by Xerox as salary continuance in consideration for this Release, and I agree to pay all of Xerox's costs and expenses in

defending the claim or action, including Xerox's reasonable attorney's fees.

10. I understand and acknowledge that Xerox policy provides that for a period of one year after the termination of my employment with Xerox, I am not eligible for rehire as an employee, or for retention as a contract worker or consultant.

11. I acknowledge that I have been advised by Xerox as follows:

- **TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE I SIGN THIS RELEASE;**
- **TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE. I HAVE 45 DAYS FROM THE DATE THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN IT TO XEROX;**
- **THAT EVEN AFTER I SIGN AND RETURN THIS RELEASE TO XEROX, I WILL HAVE 7 DAYS THEREAFTER TO CHANGE MY MIND AND REVOKE MY RELEASE BY ASKING XEROX FOR ITS RETURN.**

12. I understand and agree that this Release waives all claims I may have at the time I sign it, including claims I do not then know about or suspect. I further understand and acknowledge that California Civil Code, Section 1542 provides: "A GENERAL RELEASE DOES NOT

EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." I waive any rights I may have under that Code section, if applicable, or any other similar state or federal statute or common law principle of similar effect.

Date Release provided to employee: August 25, 2005

Date Signed and returned to Xerox: September 14, 2005.

By: /s/ Charles Zabinski
Employee signature

Charles Zabinski
Employee Name (Please print)

973201
Xerox Employee Number

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

00-CV-6311(L)

[Filed November 10, 2006]

PAUL J. FROMMERT, et al.,
Plaintiffs,

v.

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS and XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Defendants.

DEFENDANTS' STATEMENT OF MATERIAL FACTS

DEFENDANTS' LOCAL RULE 56 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Local Rule 56, defendants the following material facts are not in genuine dispute:

1. Defendant Xerox Corporation Retirement Income Guarantee Plan (the "RIGP") was and is an ERISA-covered employee pension benefit plan. (*See, e.g.*, First Consolidated and Amended Complaint ¶ 1; 1989 Plan documents attached as Exhibit A to Kaster Aff.).

2. The RIGP was at all relevant times governed by a plan document, which was amended and restated from time to time. (*See* 1989 RIGP attached as Exhibit A to Kaster Aff.).

3. The RIGP provides retirement benefits only to eligible employees, who are defined to exclude "[a]ny person covered by a collective bargaining agreement whose terms do not require coverage under this Plan." (Kaster Aff., Ex. A, section 1.14; *see also* Jaffe Aff., sworn to November 15, 2006, Exhibit A, relevant portions of the Summary Plan Description ("SPD") stating that the retirement plan is "for exempt and non-exempt salaried employees (employees who are not covered by a collective bargaining agreement.)."

4. Xerox Corporation also maintains a separate retirement plan for its union employees entitled, "Retirement Income Guarantee Plan of Xerox Corporation and the Xerographic Division, UNITE HERE" (hereinafter referred to as the "RJGP UNITE HERE"). (*See* Exhibit B to the Kaster Aff.).

5. The Plan Administrator for the RIGP for Union Employees is the Joint Administrative Board. (*See* Exhibit B to the Kaster Aff., Article 10, section 10.1).

6. Plaintiff Lawrence Holland is a member of a union which represents hourly workers at Xerox. (First Consolidated and Amended Complaint ¶ 11).

7. Holland's retirement benefits are determined by the terms of the RIGP UNITE HERE, and he is not entitled to any benefits under the terms of the defendant RIGP. Kaster Aff. ¶¶ 3-8 and its Ex. A and B.

8. Defendants Conkright, Nazemetz, and Becker have served as the RIGP's Plan Administrator. (First Consolidated and Amended Complaint ¶¶ 13-15).

9. On or about January, 4, 2001, plaintiffs filed a motion for emergent injunctive relief requesting that Xerox be enjoined from conditioning the offer of a Voluntary Reduction in Force ("VRIF") package upon the waiver of plaintiffs' claims for in this suit for a recalculation of their retirement benefits under ERISA. In support of that motion, plaintiffs submitted an affidavit from Robert Jaffe, sworn to January 4, 2001, with attached exhibits and a Memorandum of Law.

10. Opposing counsel stated in his January 4, 2001 Affidavit submitted in support of plaintiffs' prior motion for emergent relief that "my clients have been asked to sign a general release which includes a waiver or withdrawal of any claims that were made or could have been made by them for a recalculation of retirement benefits under ERISA." (Jaffe January 4, 2001 Aff. ¶ 5. Opposing counsel further states that at least five of his clients have been asked to execute a general release which "explicitly includes a release of all claims under ERISA." (*Ia.* at ¶ 8). Opposing counsel further acknowledges in that January 4, 2001 Affidavit that the form of the general release recommends to Xerox employees considering the VRIF to consult with an attorney before signing a release and he further

avers that several employees who he represents have followed this recommendation and sought his advice. (*Id.* at ¶ 9). These individuals were: William Coons, Gerald Leonardo, Walter Petroff, Richard Spring, and Thomas Vasta. (*Id.*).

11. Xerox Corporation ("Xerox") from time to time has announced voluntary reduction in force ("VRIF") programs or involuntary reduction in force ("IRIF") actions. Xerox has a policy covering which provides for the payment of salary continuance, and may include additional incentives, in consideration for the employee signing a general release of claims, which includes up to 52 weeks of salary continuance (depending on their length of service). *See* Kaster Aff., Exhibit C.

12. The RIGP Plan Administrators did not have any involvement in Xerox' establishing or implementing the VRIF or IRIF policies, including the conditioning the payment of a salary continuance upon the signing of a general release. Kaster Aff., Ex. C; and Ex. A, RIGP section 10.5, Duties of Plan Administrator.

13. Twenty-two individual plaintiffs have executed general releases as part of either a VRIF or IRIF, including Mathew Alfieri; William Burritt (December 1, 2005); Frank Commesso (September 22, 2005); William Coons (August 6, 2002), Bruce Craig (January 1 2003); Richard Crater (December 7, 2005); Frank Darling (November 27, 2005); John Crisafulli (August 31, 2004); Deborah Davis (January 15, 2004); Charles Drannbauer (November 10, 2002); Carol Gannon ((May 24, 2001); James Garnier (September 30, 2005); Larry Gallagher (December 5, 2005); Janice Heller (June 11,

2002); Charles Hobbs (December 7, 2005); Gerald Leonardo (December 18, 2002); Charles Maddalozzo (June 17, 2003); Walter Petroff,(September 2, 2004-); Kenneth Pietrowski (November 5, 2005); Irshad Qureshi (February 23, 2001); Charles Williams (November 2, 2002); and Charles Zabinski (September 14, 2005). Kaster Aff., Exhibit D).

14. Each of these individuals identified above are educated and worked in salaried positions at Xerox for many years. Using opposing counsel's own example, Plaintiff Pietrowski has a college degree, was employed in an engineering position in Xerox's Innovation Group, and admittedly signed a General Release on November 23, 2005.

15. The Releases signed by the above individual plaintiffs expressly provide, in pertinent part, that employee releases "Xerox from any and all claims, based upon anything that has occurred prior to the date I signed the release," including claims under ERISA. For purposes of the release, 'Xerox" is defined to include, not only the company, but any of its employees, and agents, and employee benefit plans in which the plaintiff participates or participated. In signing the release, each employee acknowledges that he or she did so voluntarily and was **not** pressured into it. Kaster Aff. Ex. D.

16. The Releases signed by the above individual plaintiffs also expressly advised plaintiffs: **"TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE SIGNING THIS RELEASE; TO TAKE SUFFICIENT TIME TO DECIDE**

WHETHER TO SIGN THE RELEASE." Kaster Aff. Ex. D.

17. The Release signed by the above individual plaintiffs further informed plaintiffs that them had 45 days to consider the release before returning it and that they had an additional 7 days to change their mind and revoke their decision. (Exhibit C, p. 2 to the Jaffe Aff.; Kaster Aff. Ex. D).

18. In signing the Release, the above individual plaintiffs further agreed **not** to file or pursue any claim or action with any court against the releasees for events which took place prior to the date of the release and agreed to pay all of the releasees' costs and expenses in defending against a claim, including reasonably attorney's fees, should he act contrary to the terms of the Release. Kaster Aff. Ex. D

19. The above individual plaintiffs were paid or will be paid by the end of their salary continuance period up to 52 weeks of salary continuance. Kaster Aff. Ex. D.

20. Plaintiff Pietrowski was paid salary continuance totaling $130,971 in exchange for signing a Release. *See* page 10 of Plaintiffs' Memorandum of Law submitted in support of their motion, which states the amount Pietrowski was paid.

21. At the time that the above individual plaintiffs signed the releases, they were represented by counsel, and their ERISA claims were in dispute. *See* dates on the releases attached as Ex. D to the Kaster Aff.

22. At the time Pietrowski executed his Release, this Court had granted summary judgment dismissing plaintiffs' claims, and the matter was on appeal. *See* date on Pietrowski release, contained in Kaster Aff. Ex. D.

23. Each of the above individual plaintiffs was given 45 days within which to consider whether or not to sign the release. Moreover, pursuant to the terms of their releases, each plaintiff was given seven additional days within which to revoke his or her decision. Kaster Aff. Ex. D.

Dated: November 10, 2006

Respectfully submitted,

NIXON PEABODY LLP
Attorneys for Defendants

By: /s/ Margaret A. Clemens
Margaret A. Clemens, Esq.

Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(585) 263-1000

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